

MARK SCHERZER, ESQ. (MS-2622)  
Attorney for Plaintiff  
7 Dey Street, Suite 600  
New York, New York 10007  
Tel: (212) 406-9606

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
RICHARD ZLETZ, :

Plaintiff, : 07 CIV 11507 (HB) (RLE)

-against- :

UNUM LIFE INSURANCE COMPANY :  
OF AMERICA, :

Defendant.

**REPLY TO DEFENDANT’S  
“CONDITIONAL COUNTERCLAIM”**

-----X

Plaintiff, Richard Zletz, by his attorney, Mark Scherzer, Esq., for his Reply to the  
“Conditional Counterclaim” contained in defendant First Unum Life Insurance Company’s  
Answer to First Amended Complaint, respectfully alleges:

1. Paragraph 34 of the Conditional Counterclaim contains no factual allegations. To the extent that a reply is required to the legal conclusions contained therein, plaintiff denies (i) that he was without coverage under the Policy maintained by First Unum Life Insurance Company (“Unum”), (ii) that his entitlement to benefits is subject to any exclusion or limitation by virtue of any purported “pre-existing condition,” and (iii) that Unum made any overpayment to Mr. Zletz.

**FIRST AFFIRMATIVE DEFENSE:**

2. Unum’s Conditional Counterclaim is barred by ERISA, which provides no cause of action for a claim fiduciary to reverse, annul, or otherwise void its own prior claim

determination approving benefits.

**SECOND AFFIRMATIVE DEFENSE:**

3. Unum's Conditional Counterclaim is contractually barred by the Policy, which provides for the recovery of "overpayments" only in the case of overpayments by virtue of the belated receipt of Social Security disability benefits, and which does not provide for forfeiture of coverage by virtue of an attempted return to the workplace, without performance of actual work, while disabled.

**THIRD AFFIRMATIVE DEFENSE:**

4. Unum's Conditional Counterclaim is barred by laches, due to, among other things, its failure to raise such conditional defense for over 12 years after disclosure by plaintiff to Unum of the facts alleged in the Complaint.

**FOURTH AFFIRMATIVE DEFENSE:**

5. Unum's Conditional Counterclaim is barred by waiver, due to, among other things, its payment of Mr. Zletz's claim without reservation of rights and with full knowledge of the facts alleged in the Complaint.

**FIFTH AFFIRMATIVE DEFENSE:**

6. Unum's Conditional Counterclaim is barred by estoppel, due to, among other things, plaintiff's expenditure of benefits received and arrangement of his financial affairs in reliance on Unum's representation that he was entitled to such benefits.

**SIXTH AFFIRMATIVE DEFENSE:**

7. Unum's Conditional Counterclaim is barred by the applicable statute of limitations.

**SEVENTH AFFIRMATIVE DEFENSE:**

8. Unum's Conditional Counterclaim fails to state a claim upon which relief may be granted.

**EIGHTH AFFIRMATIVE DEFENSE:**

9. Based upon Unum's actions in the handling of this claim, as alleged in plaintiff's First Amended Complaint, Unum's Conditional Counterclaim is barred by the doctrine of unclean hands.

**NINTH AFFIRMATIVE DEFENSE:**

10. Based upon Unum's status as a claim fiduciary, its determination in its own administrative proceeding that Mr. Zletz was entitled to benefits, and its communication of that determination to state regulators monitoring the Multistate Regulatory Settlement Agreement, Unum's Conditional Counterclaim is barred by judicial estoppel.

**WHEREFORE**, plaintiff demands judgment dismissing Unum's Conditional Counterclaim and awarding him his reasonable attorneys' fees and costs incurred in this action and such other, further and different relief as to the Court may seem just, proper, and equitable.

Dated: New York, New York  
April 2, 2008

/s/ Mark Scherzer  
MARK SCHERZER, ESQ. (MS-2622)  
Attorney for Plaintiff  
7 Dey Street, Suite 600  
New York, New York 10007  
Tel: (212) 406-9606